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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 640

VICTOR HEMPHILL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH BOSTICK LISTON, DECEASED,
Petitioner,

vs.

WABASH RAILROAD COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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vs.

WABASH RAILROAD COMPANY, A CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Supreme Court of the United States:

Your petitioner, Victor Hemphill, as Executor of the Last Will and Testament of Joseph Bostick Liston, deceased, by his attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit (Rec. 41) affirming the judgment of the United States District Court for the Southern District of Illinois, Southern Division (Rec. 17).

STATEMENT.

This case presents solely a question of law and arises out of the fact that an action was brought in the District Court to recover damages for the wrongful death of Joseph Bostick Liston, deceased, occasioned by the alleged negligence of the Respondent in running its locomotive and train of cars across a public street crossing at grade at Sparks Street in the Village of Raymond, Illinois in violation of a speed ordinance of said Village regulating the speed of trains through the corporate limits. The amended complaint consisted of two counts. The first count charged general negligence and the second count charged the negligent violation of the ordinance. Respondent answered the first count and moved to strike the second count. The District Court sustained the motion to strike Count 2. Petitioner thereupon dismissed Count 1 of the complaint and elected to stand on Count 2. The District Court entered judgment in favor of Respondent. The judgment was appealed to the United States Circuit Court of Appeals for the Seventh Circuit. The Circuit Court of Appeals affirmed the judgment of the trial court. The opinion and judgment of the Circuit Court of Appeals which is found at Rec. p. 33 and in Appendix hereto was by a divided Court in which Circuit Judge Swaim entered a dissenting opinion (Rec. p. 38 and in Appendix hereto). The error relied upon is the action of the Court of Appeals in affirming the judgment of the District Court. The complaint alleged the necessary facts to give the District Court jurisdiction, the appointment of Petitioner as Executor and damages sustained. There is no dispute about these allegations. The ordinance set out in the complaint (Rec. 11), prohibited the running of trains at a greater rate of speed than 10 miles per hour

through the corporate limits. The complaint charged a violation of this ordinance. The complaint also set out certain statutes of the State of Illinois and alleged that these Statutes gave Cities and Villages the power to regulate the speed of trains (Rec. 10-12). The statutes pled in *haec verba* were Sections 1 of Article 1, Sections 1, 28 and 106 of Article 23 and Section 1 of Article 87 of the Revised Cities and Villages Act, Chapter 24, and Section 24 of An Act in Relation to Fencing and Operating Railroads, Chapter 114, Paragraph 80, all in Illinois Revised Statutes, 1949 (Rec. 10).

A motion was made to strike this Count on the ground that the statutes and ordinance were null and void and of no force and effect because the said statute enactments and the ensuing power to adopt such a Village ordinance were revoked, repealed and made of no force and effect by reason of an Act Concerning Public Utilities, being Sections 1 to 95, both inclusive of Chapter 111⅔, Illinois Revised Statutes, 1949 and particularly by and because of Sections 57, 58 and 59 thereof.

The question at issue is solely one of law and the proposition involved is this—Did the amended complaint state a cause of action when it alleged that the wrongful death of plaintiff's testate was caused by the running of a locomotive and train of cars across Sparks Street in the Village of Raymond, Illinois, and into, over and upon the testate in violation of an ordinance of said Village regulating the speed of trains in the corporate limits. The motion to strike Count 2 asserted that the ordinance was invalid in that the Public Utilities Act of the State of Illinois, approved June 29, 1921, and in particularly Sections 57, 58 and 59 thereof, repeals by implication Article 23, Section 28 of Chapter 24, the Revised Cities and Villages Act of Illinois, effective January 1, 1942, which gave

power to Cities and Villages to regulate the speed of trains and locomotives in the corporate limits. The Respondent asserts that the Public Utilities Act did not repeal the Act in question in that the Legislature of Illinois specifically gave the power to Cities and Villages in Illinois to pass the ordinance and the Legislature of Illinois in order to show its definite intention enacted as a part of the Revised Cities and Villages Act, Article 23, Section 106, which gives the power to pass ordinances in aid of granted powers, and Article 87, Section 1, which provides that the powers given are to be considered as alternative or additional powers and not as a limitation upon any other power granted to or possessed by municipalities and to be exercised independently of other agencies of State Government; and if inconsistent with powers granted to other agencies of the State Government, the powers granted are to be considered as an alternative or additional power granted to, or possessed by municipalities.

REASONS WHY CIRCUIT COURT OF APPEALS ERRED.

The following are the reasons why the judgment of the Court of Appeals is erroneous:

1. The Supreme Court of Illinois has construed the statutes in question contrary to the constuction made by the Circuit Court of Appeals and in view of the decision of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 83 L. ed. 1188, the decision of the Court of Appeals is erroneous.

2. The Circuit Court of Appeals in reaching its conclusion cites as authority cases which no longer state the law in view of the Revised Cities and Villages Act and cites one authority which the Supreme Court of Illinois no longer adheres to.

3. The Circuit Court of Appeals has erroneously through misconception attempted to explain the leading case in Illinois, viz., *Aliotta* v. *City of Chicago,* 348 Illinois 193, which case has decided the question of law involved.

4. The Circuit Court of Appeals has erroneously made judicial legislation.

5. The Circuit Court of Appeals has erroneously construed the Revised Cities and Villages Act of Illinois to give cities and villages general powers when in fact the powers granted to cities and villages under the Revised Cities and Villages Act are specific powers.

6. The Circuit Court of Appeals in the question involved in this case has erroneously construed the Public Utilities Act of Illinois as giving a specific grant of power to Illinois Commerce Commission when in fact as to the question presented in this case, the power is general.

7. The Circuit Court of Appeals erred in stating that there is no residuum of power in Cities and Villages to pass the Ordinance in question because the Legislature in the Revised Cities and Villages Act specifically points out that there is a residuum of power.

8. The Circuit Court of Appeals has erroneously construed the Public Utilities Act which was enacted in 1921, as giving exclusive power to Illinois Commerce Commission to regulate the speed of trains in view of the language of the Revised Cities and Villages Act enacted in 1941, effective January 1, 1942.

9. The Circuit Court of Appeals has erroneously held that the Legislature of Illinois by new legislative enactment cannot take away from a creative of the Legislature any power previously given.

10. The Circuit Court of Appeals has erroneously applied the rule of repugnancy between statutes.

11. There is no specific provision in the Public Utilities Act that specifically gives the power to the Commerce Commission to regulate the speed of trains within corporate limits of a city or village. The only specific power granted to regulate the speed of trains is in "passing over defective tracks, bridges, trestles or other structures until repairs or new construction required are made."

OPINIONS BELOW.

The District Court rendered no written opinion and entered judgment dismissing the complaint. The Circuit Court of Appeals in an opinion written by Circuit Judge Lindley concurred in by Circuit Judge Duffy and dissented to by Circuit Judge Swaim affirmed the action of the trial court. The opinion of the Court appealed from and the dissenting opinion appear at Rec. pp. 33 to 40 and in the Appendix hereto.

JURISDICTIONS.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on the 7th day of January, 1954 (Rec. 41). A Petition for Re-Hearing filed in said cause was denied on the 17th day of February, 1954, from which date the right to file this Petition for a Writ of Certiorari is computed, and this Petition for Writ of Certiorari was filed on the *16th* day of March, 1954, with the Clerk of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) and Rule 38 (5-B) of the Rules of this Court.

STATUTES INVOLVED.

The Statutes involved are certain sections of Illinois Revised Cities and Villages Act, approved August 15, 1941, effective January 1, 1942. The Sections are Article 1-1, Article 23-1, Article 23-28, Article 23-106, Article 87-1, Article 87-4, Article 87-5 of Chap. 24, Illinois Revised Statutes 1953, Vol. I; also found in Smith Hurd Illinois Annotated Statutes, same chapter and section numbers; Paragraph 80, Section 24, Chap. 114, Railroads and Warehouses, Illinois Revised Statutes, 1953, Smith Hurd Illinois Annotated Statutes, same chapter and section number, and Illinois Public Utilities Act of 1913 as amended in 1921, Chap. 111⅔, Secs. 8, 8a, 9, 10a, 61 (57) and 62 (58), Illinois Revised Statutes 1953, Vol. II Smith Hurd Illinois Annotated Statutes, same chapter and section numbers.

QUESTION PRESENTED.

The question presented is this—Did Count II of the amended complaint state a cause of action when it alleged that the wrongful death of plaintiff's testate was caused by the running of a locomotive and train of cars across Sparks Street in the Village of Raymond, Illinois, and into, over and upon the testate in violation of the Ordinance of said Village regulating the speed of trains in the corporate limits. The motion to strike Count II asserted that the ordinance was invalid in that the Public Utilities Act of Illinois, approved June 29, 1921, and in particular Sections 57, 58 and 59 thereof repealed by implication Article 23, Sec. 28 of Chapter 24, the Revised Cities and Villages Act, effective January 1, 1942, giving to Cities and Villages power to regulate speed of trains and locomotives in the corporate limits. The petitioner to meet the issue, asserts that the Public Utilities Act did not re-

peal the Act in question in that the Legislature specifically gave the power to pass the Ordinance, and to definitely show that such was the intention of the Revised Cities and Villages Act, enacted as a part thereof, Article 23, Section 106, which gives the power to pass ordinances in aid of granted powers and Article 87, Section 1, which provides that the powers given are to be considered as alternative or additional powers and not as a limitation upon any other power granted to or possessed by municipalities, and to be exercised independently of other agencies of State Government; and if inconsistent with powers granted to other agencies of the State Government, the powers granted are to be considered as an alternative or additional power granted to, or possessed by a municipality.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The judgment of the Court of Appeals has decided an important question of local law in a way that is probably in conflict with applicable local decisions.

The Court of Appeals, when it struck down the Ordinance, has nullified and declared void Article 23-28 and Article 87-1 of the Revised Cities and Villages Act of 1941, contrary to the construction of 23-91 and 87-1 by the Supreme Court of Illinois, in *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Illinois 506, 39 N. E. 2d 26, which announces the rule of construction of Cities and Villages Act when general powers under the Public Utilities Act are asserted as against specific power granted in Revised Cities and Villages Act, and in *Aliotta* v. *City of Chicago*, 59 N. E. 2d 829, which case involved the same Article under a specific grant of power to regulate barbers, etc., when the power was asserted to be lodged in

another department of the State Government; and thereby has decided an important question of local law in a way probably in conflict with applicable local decisions, all as pointed out in the dissenting opinion of Circuit Judge Swaim.

Under the rules of construction announced in the above cases, an inspection of all the Sections of the Public Utilities Act will disclose that there is no specific language giving to Illinois Commerce Commission any right to regulate the speed of trains, except the right in the Commission to regulate the speed of trains or cars passing over defective tracks, bridges, trestles or other structures until repairs or new construction required are made. Section 61, Chap. 111⅔. Illinois Revised Statutes—(A very limited power). These sections are set out in the appendix hereto.

Under the applicable authorities Count II of the Amended Complaint stated a cause of action and certiorari should be granted.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its Docket 10945, *Victor Hemphill, as Executor of the Last Will and Testament of Joseph Bostick Liston, deceased, Appellant* v. *Wabash Railroad Company, a corporation, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States and that the judgment herein of said United States Court of Appeals for the Seventh Circuit and that the judgment of the District Court of the United States for the Southern

District of Illinois, Southern Division, be reversed by the Court and for such further relief as to this Court may seem proper.

Dated this 16th day of March, 1954.

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Attorneys for Petitioner.

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PETITIONER'S BRIEF.

STATEMENT.

The statement heretofore made in the Petition for Review by Writ of Certiorari is hereby adopted as the statement of the case pages 2 to 3 and made a part of this brief. It is necessary in addition thereto to state that three periods of time are to be taken into consideration, viz: From 1870 to 1927, from 1927 to Jan. 1, 1942, and from Jan. 1, 1942 to present. The right of Cities and Villages in Illinois to regulate the speed of trains was given to Cities and Villages by the laws of 1870 and this right continued until Feb. 16, 1927. In 1913, effective Jan. 1, 1914, the legislature passed the Public Utilities Act, which has subsequently been revised into the Public Utilities Act

of 1921. Since 1870 Illinois has had a City and Villages Act, which during all of the time had given to cities and villages the specific power to regulate the speed of trains in the corporate limits until Feb. 16, 1927, when the Supreme Court of Illinois in the case of *City of Witt* v. *C. C. & St. L. Ry. Co.* 324 Ill. 494, held that the power given to cities and villages to regulate speed was repealed by implication. Since the decision in this case, in which there was a dissenting opinion, the Illinois Commerce Commission, a creature of the Public Utilities Act, has never passed a rule or regulation regulating the speed of trains in the corporate limits of a city or village or any other place. Nevertheless petitioner concedes that the law as interpreted by the Supreme Court governed until Jan. 1, 1942, although in the light of later decisions, there is doubt about the construction given to the Act by the Illinois Court. It is also stated as a matter of fact that on July 1, 1927, after the Supreme Court of Illinois decision above referred to, the Legislature re-enacted the same speed section and it continued until Jan. 1, 1942 when the Revised Cities and Villages Act came into full force and effect. This act which was an entire revision of the law concerning cities and villages again included therein the right of Cities and Villages to regulate the speed of locomotives and cars under Article 23-28. The Revised Cities and Villages Act of 1941 included a section, Article 87-1, which had never previously been included. It is this section, petitioner believes that definitely shows the intention of the Legislature to overcome the decision of *Witt* case, *supra,* and to again place in Cities and Villages the right and power to pass Ordinances regulating speed of trains. The Ordinance of the Village of Raymond was pled verbatim in Count II of the amended complaint and for the convenience of the Court is inserted in full in the Appendix hereto (Rec. pp. 11, 12).

SPECIFICATION OF ERRORS.

1. The Court erred in not following the decisions of the highest court of the State of Illinois in determining the effect of Articles 23-28 and 87-1 of the Illinois Revised Cities and Villages Act of 1941.

2. The Court failed to apply the rule that the Court of Appeals or any Federal Court is bound to follow the highest Court of Illinois interpreting the Statutes of the State of Illinois as announced in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, as pointed out in the dissenting opinion.

3. The Court erred in holding that Article 23-28 was a general grant of power, when it is in fact a specific grant of power.

4. The Court erred in holding that the Public Utilities Act gave to Illinois Commerce Commission a specific grant of power to regulate the speed of trains, when in fact the power under the light of legislation and new judicial construction, if any right exists, is a general power.

5. The Court erred in holding that general power in one act overcomes specific power given in another act.

6. The Court erred in holding that the Public Utilities Act gives exclusive power to Illinois Commerce Commission to regulate the speed of trains and this is especially since the second *City of Geneseo* case, 378 Ill. 506.

7. The Court erred in holding that repugnancy exists between the Cities and Villages Act and the Public Utilities Act and if repugnancy does in fact exist applied the rule improperly.

8. The Court erred in holding there is no residuum of power in cities and villages to pass a speed of trains ordinance.

9. The Court erred when it stated that the case of *Aliotta* v. *City of Chicago,* 389 Ill. 418, held only that Section 87-1 operates to prevent a grant of authority to a department of the State Government from effectuating a repeal by implication of a prior grant of like authority to municipalities, absent repugnancy between the two statutory grants.

10. The Court erred in holding "The Touchstone of this decision (*Aliotta* case), is want of repugnancy in the concurrent exercise by two distinct agencies of power over the same subject matter.

11. The Court erred in comparing *Aliotta* v. *City of Chicago* with *Chicago Motor Coach Co.* v. *City of Chicago,* 337 Ill. 200, because the Supreme Court of Illinois has specifically stated in the case of *City of Geneseo* v. *Illinois Northern Utilities Co.,* 378 Ill. 506, when in overruling *City of Geneseo* v. *Illinois Northern Utilities Co.,* 363 Ill. 89, that it no longer adheres to *Chicago Motor Coach Co.* v. *City of Chicago.*

12. The Court erred in stating that judicial decisions make the law of Illinois, when in fact under the Illinois Constitution, the power to make the law is vested exclusively in the Legislative Department.

13. The Court erred when it held that it was dealing with a body possessing what has judicially construed as exclusive powers over the regulation of public utilities when it failed to take into consideration the decision of the Supreme Court of Illinois explaining the distinction between specific grant of powers and general grant of powers, namely *City of Geneseo* v. *Illinois Northern Utilities Co.,* 378 Ill. 506.

14. The Court erred in holding that it was not the intention of the Legislature to grant concurrent power to

cities and villages to regulate with the Commerce Commission the speed of trains, having failed to take into consideration every word of Section 87-1 of the Revised Cities and Villages Act.

PETITIONER'S BRIEF.

I.

The Court of Appeals Is Bound to Follow the Decisions of the Supreme Court of Illinois in the Interpretation of Local Law.

This Court has definitely settled the proposition that Federal Courts are bound to follow the decisions of the highest court of a state in the interpretation of local law under the requirement of the Acts of Congress.

U. S. C. Title 28, Sec. 1652.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 78, 82 L. ed. 1188, 58 S. Ct. 817, 822.

II.

The Supreme Court of Illinois Has Declared the Proper Construction of the Revised Cities and Villages Act.

In construing Articles 23-91 and 87-1 of the Revised Cities and Villages Act the Supreme Court of Illinois has announced the rule that the provisions of Sec. 87-1 "The provisions of this act shall be cumulative in effect, and if any provision is inconsistent with another provision of this Act or with any other Act not expressly repealed by Sec. 87-1 it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities" (Laws of 1941, Vol. 2, p. 399). The Act of 1937, revising the law in relation to barbers is not repealed by section 87-4 of the Revised Cities and Villages Act, and therefore under the

provisions of Sec. 87-1, section 23-91, if inconsistent with the Barbers Act of 1937, shall be considered as an alternative or additional power granted to, or possessed by, municipalities. These statutory provisions negative the theory that the power of the city to license or regulate barbers has been repealed by the Act of 1937. Section 2 of the Act relating to construction of statutes (Ill. Rev. Stat. 1943, Chap. 131, par. 2), providing that a re-enactment of a former statute, as far as it is the same, shall not be considered a new enactment, does not apply, for the reason that, while the barber provision in the 1941 Revised Cities and Villages Act is the same as that found in the laws of 1935, it has in addition, attached and read into it a part thereof that, in case of conflict, the provision of the later act shall be considered as an alternative or additional power.

Aliotta v. *City of Chicago,* 389 Ill. 418, 421, 422; 59 N. E. 829, 830, 831.

III.

The Supreme Court of Illinois in a Number of Cases Decided Prior to Enactment of Revised Cities and Villages Act and Prior to the Second City of Geneseo Case Held That There Was an Implied General Power in the Illinois Commerce Commission Under the General Theory of the Right to Regulate Utilities, That Gave the Commission Power to Regulate Over Specific Powers Given to Cities and Villages.

These cases commence with the *Village of Atwood* v. *C. & I. W. Rd. Co.* and end with second *City of Geneseo* v. *Illinois Northern Utilities* case and some which petitioner believes support this proposition are cited here-

under, the last two of which the Supreme Court of Illinois says are no longer adhered to.

Village of Atwood v. *C. & I. W. Rd. Co.*, 316 Ill. 425; 147 N. E. 449.

Northern Trust Co. v. *Chicago Railways Co.*, 318 Ill. 402; 149 N. E. 422.

City of Witt v. *C. C. C. & St. L. Ry. Co.*, 324 Ill. 494; 155 N. E. 325.

City of Altamont v. *B. & O. Rd. Co.*, 348 Ill. 339; 180 N. E. 809.

Chicago Motor Coach Co. v. *City of Chicago*, 337 Ill. 200; 169 N. E. 22.

City of Geneseo v. *Illinois Northern Utilities Co.*, 363 Ill. 89; 1 N. E. (2d) 392.

IV.

The Supreme Court of Illinois Changed Its Position in the Second City of Geneseo v. Illinois Northern Utilities Co. Case and Announced the New Rule That in Order to Overcome the Cities and Villages Act, Specific Power Must Be Found in the Public Utilities Act Giving Power to Commerce Commission to Do So.

1. When we see the care the legislature has taken to give to the Commerce Commission general supervision over utilities and has granted a special power to it in each case where the general authority of the City would otherwise prevail, the absence of power granted by express words to control the occupancy of streets, except in accordance with a franchise, issued by the City, is of the greatest significance. We are of the opinion that the power claimed to exist in the Commerce Commission has not been given by the legislature.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 501; 39 N. E. (2d) 26, 38.

2. The power given to Illinois Commerce Commission by Sec. 49a of the Public Utilities Act is directed against the utility and enables the Commerce Commission to compel performance of public service "to protect the public interest", and it cannot be construed as giving the Commission power to compel a municipality to permit a public utility to continue occupancy of public streets after the expiration of the municipal franchise, as the power given is regulation of the utility and not regulation of the occupancy of the streets of a city.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 527, 528; 39 N. E. 26, 36, 37.

3. Examination of the Public Utilities Act shows an intent upon the part of the legislature to grant general supervision by the Commerce Commission over all classes and types of utilities, and to give specific and express authority in certain instances where a general power might be ineffective as conflicting with specific authority elsewhere. This is apparent from the framework of the Act.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 520; 39 N. E. (2d) 26, 34.

4. It is to be noted—that nowhere is there to be found in the act express power taking from the city the "right to permit—or prohibit the use of any street, alley or public place within a city."

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 521; 39 N. E. (2d) 26, 34.

5. The legal proposition to be adduced—is that wherever there is a specific power or authority granted to the Commerce Commission, which is in opposition to a like or similar power granted the city or village, the former will prevail, and the latter without express repeal will become ineffective and the converse of this proposition is like-

wise true—*i. e.* specific grant of power to a city, it will prevail.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 517; 39 N. E. (2d) 26, 32.

6. A judicial opinion, like a judgment, must be read as applicable only to the facts involved and is authority only for what is actually decided.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 519; 39 N. E. (2d) 26, 33.

V.

Definitions of the Words "Specific" and "General" and the Effect Thereof in the Same or Other General Statutes.

1. The word "specific" is defined as "precisely formulated or restricted; specifying; definite or making definite; explicit; of an exact or particular nature."

The word "general" is defined as "not restrained or limited to a precise import or application; not specific; not entering into detail or minutiae."

Webster's New International Dictionary.

2. The well settled rule of statutory construction is that where there is found in a statute a particular enactment, it is held to be operative as against the general provisions on the subject in the same act or in the general law relating thereto.

The People v. *Wabash R. R. Co.*, 395 Ill. 520, 540 70 N. E. (2d) 718, 728.

3. General and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that the general

words are restricted to a sense analogous to the less general. Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms.

50 Am. Jur. Statutes, Sec. 249, p. 244.

4. It is a general principle of statutory interpretation that the enumeration of certain specified things implies the exclusion of all others (citing this Court).

People ex rel. Hansen v. *Collins*, 351 Ill. 551, 555; 184 N. E. 641, 642.

5. The Commerce Commission is given a very limited and specified power to regulate the speed of trains as follows: "The Commission may also prescribe the rate of speed for trains or cars passing over defective tracks, bridges, trestles or other structures until repairs or new construction required are made."

Chap. 111⅔, Public Utilities, Sec. 61, p. 624.
Ill. Rev. Stat. 1953; Smith Hurd Ill. Ann. Stat. same chapt. title and section number.

VI.

It Is the Duty of the Courts to Interpret the Law.

1. The Supreme Court of Illinois recognizes that its function is to interpret the law of Illinois; that it is not for it to judge the propriety of legislation but to construe the law when enacted; and that the legislature has the power to give authority and the right to take it away, or to place it jointly with a city or village and with administrative branches of State Government.

City of Geneseo v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 532, 533; 39 N. E. (2d) 26, 39.

VII.

Repeals by Implication Are Not Favored.

1. Repeals by implication are not favored. It is only when there is clear repugnancy and both acts cannot be carried into effect that the former is repealed. Statutes which are seemingly repugnant should, if possible, be so construed that the subsequent act may not operate to repeal by implication the earlier act. Where a special act is repugnant to or inconsistent with a prior general statute a partial repeal of the latter will be implied or exception grafted upon the general statute. In determining whether one statute is repugnant to another the Court should consider its several parts in connection with correlated sections in *pari materia*. The repeal by implication of one act by a later act is not effected by mere conflicts or inconsistencies between them, but only where the carrying out of the later act prevents the enforcement of any part of the former. To the extent they are in conflict the first act is repealed, but the parts of the first act not affected remain in full force and effect.

City of Geneseo v. *Illinois Northern Utilities Co.*,
378 Ill. 506, 529; 39 N. E. (2d) 26, 37.

VII.

Rules of Construction Only Govern When the Legislature Has Not Expressed an Intention.

1. Rules of construction only govern, when the legislature has failed to manifest an intention and where the legislature specifically manifests an intention, then the legislative intention governs; the rules of construction are only to be observed where such construction would not be

inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute.

People v. *Lindheimer,* 371 Ill. 367, 376; 21 N. E. (2d) 318, 322.

IX.

There Is No Vested Right in a Public Statute and the Legislature Has the Right to Repeal It at Will.

1. There is no vested right in a public statute and if, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws, individuals have no cause to complain.

People v. *Lindheimer,* 371 Ill. 367, 373; 21 N. E. (2d) 318, 322.

2. The legislature has the undoubted right to repeal or amend all legislative acts which are not in the nature of a private grant.

Smolin v. *Industrial Commission,* 324 Ill. 32, 36; 154 N. E. 441, 443.

X.

Statutes and Ordinance Involved.

The statutes particularly involved are Articles 1-1, 23-28, 23-106, 87-1, 87-5; all in Chapt. 24; Sec. 24 (Para. 80), Chapt. 114; and Sections 8, 8a, 9, 10a, 61 and 62, Chapt. 111⅔, and Chapt. XIII, Article 1, Sec. 160, Ordinances of Village of Raymond, Illinois, all of which are set out in Appendix hereto.

SUMMARY OF THE ARGUMENT.

I.

The complaint stated a cause of action under the ordinance plead alleging the negligent death due to a violation thereof under Articles 23-28 and 87-1 of the Revised Cities and Villages Act of 1941.

II.

The judgment of the Court of Appeals is erroneous in that it fails to follow the Supreme Court of Illinois as announced in *Aliotta* v. *City of Chicago* and in the second *City of Geneseo* v. *Illinois Northern Utilities Co.* cases.

III.

The Court of Appeals has failed to follow applicable rules of law governing the factual situation and in so doing denies the right of the Illinois Legislature to change the law at its will.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

The Complaint Stated a Cause of Action and the Question Involved Is Purely One of Law.

The issue presented by this petition is this—Did the majority opinion of the Court of Appeals follow the local law of Illinois as decided by its highest court? The question arises under the statutes of Illinois and opinions of the Supreme Court of Illinois construing the statutes. Petitioner believes that the dissenting opinion properly states the law. The opinion and dissent are attached under Appendix hereto and in Rec. 33 to 40, inclusive.

The complaint alleged that the negligence of respondent was the violation of an ordinance of the Village of Raymond regulating the speed of trains (Rec. 10 to 12). The motion to strike asserted that the ordinance was void by reason of Sections 1 to 95, and particularly by Sections 57, 58 and 9 of the Illinois Public Utilities Act (Rec. 15, 16). These sections are from the original act and are set out in the Appendix hereto as Sections numbers 9, 61 and 62, as numbered in the Statute (Appendix).

The statutes that are actually involved are Articles 23-28 and Article 87-1 of the Revised Cities and Villages Act and Sections 61 and 62 of the Public Utilities Act.

It is well to keep in mind three periods of time when the question is considered. These periods of time are from 1870 to 1927, 1927 to Jan. 1, 1942, the date when the Revised

Cities and Villages Act became effective and from the latter date to the present time.

Cities and villages without question had the right to regulate the speed of trains in their corporate limits from 1870 to Feb. 16, 1927. The latter date was the date of the opinion of the Supreme Court in the case of *City of Witt* v. *C. C. C. & St. L. Ry. Co.*, 324 Ill. 494, 155 N. E. 325, which case held that the power of cities and villages to regulate the speed of trains was taken away by the Public Utilities Act of 1921. We concede that during the period of Feb. 27, 1927 to Jan. 1, 1942, because of the aforesaid decision, the right of a city or village to regulate the speed of trains was stricken down, although in the light of what the Supreme Court of Illinois said in the second *City of Geneseo* v. *Illinois Northern Utilities* case, 378 Ill. 506, there is doubt thrown around the *Witt* decision.

Effective Jan. 1, 1942, the Revised Cities and Villages Act became effective. The new Act included under Article 23-28, a section on speed of trains as follows: viz., "23-28" Streets—Speed of vehicles, To regulate the speed of animals, vehicles, cars and locomotives, and also included Article 87-1, viz.:

> "87-1 (Act confers cumulative powers without impairing powers of state agencies.) The provisions of this Act shall be cumulative in effect and if any provision is inconsistent with another provision of this Act or with any other Act not expressly repealed by 87-4, it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities. But the provisions of this Act shall not be considered as impairing, altering, modifying, or repealing any of the jurisdiction or powers possessed by any department, board, commission, or officer of the State government immediately prior to the effective date of this Act."

It is the position of petitioner that these sections, 23-28 and this section show a definite intention on the part of the legislature of Illinois to again place in Cities and Villages the power to regulate the speed of trains; and that the Supreme Court of Illinois when it sustained Article 23-91—another section of Article 23, *Aliotta* v. *City of Chicago*, giving to cities and villages the right to "license, tax and regulate auctioneers,—barbers,—and the keepers or owners of—barber shops" has so held, when the Court denied the same right in the Department of Education and Registration as exclusive, under the Barbers Act. In this case the Court said that the position of the barbers, plaintiffs, that the power to regulate was exclusively in the Department of Registration and Education under the Barbers Act could not be sustained. The Court used the following language:

> "In this Act, by Sec. 23-91, the power of the City to tax and regulate certain occupations is *again* granted in the following language: 'To license, tax and regulate auctioneers,—barbers,—and the keepers or owners of—barber shops.' (Laws of 1941, Vol. 2, p. 177.) Against the contention that 23-91 was superseded by the Barbers Act, the Court said,
>
> "This contention fails to take into consideration section 87-1 of the Revised Cities and Villages Act, which provides: 'The provisions of this Act shall be cumulative in effect, and if any provision is inconsistent with another provision of this Act or with any other Act not expressly repealed by Sec. 87-4 it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities'—The Act of 1937, revising the law in relation to barbers is not repealed by Section 87-4 of the Revised Cities and Villages Act, and therefore under the provisions of 87-1, section 23-91, if inconsistent with the Barbers Act of 1937, shall be considered as an alternative or additional power granted to, or possessed by, municipalities.

These statutory provisions negative the theory that the power of the city to license or regulate barbers has been repealed by the Act of 1937. Section 2 of the Act relating to the construction of statutes (Ill. Rev. Stat. 1943, Chapt. 131, Par. 2) providing that a reenactment of a former statute, so far as it is the same, shall not be considered a new enactment, does not apply, for the reason that, while the barber provision in the 1941 Revised Cities and Villages Act is the same as that found in the laws of 1935, it has, in addition, attached and read into it a part thereof that, in case of conflict, the provision in the later act shall be considered either as an alternative or additional power. —It might be remarked however, that in each of the cases of *City of Chicago* v. *Jensen*, 331 Ill. 129; *Wilkie* v. *City of Chicago*, 188 Ill. 144 and *City of Chicago* v. *Burke*, 226 Ill. 191, what had been done by the city was not under an *express* grant, but under general powers, which were held to be no longer effective because the general assembly had enacted laws vesting in the State of Illinois complete authority over the particular subject. There was not present in any of these cases a *special* grant to the city and a like grant of power to the State. There was clear repugnance in those cases; there is no repugnancy in this case."

Petitioner says that if you insert the statute, *i. e.* 23-28, and Public Utilities Act in lieu of 23-91 and Barbers Act in the above opinion, the Supreme Court of Illinois has said the same thing in the *Aliotta* case, that the Court of Appeals should have said in this case and as Circuit Judge Swaim said in the dissenting opinion.

We wish to point out here that the opinion of the Court of Appeals in disposing of the case reaches a conclusion not based on the law and has either been misled or improperly construes the effect of 87-1. First, we say that the Court quotes from the *City of Witt* case, which says that the power to regulate the speed of trains statute is *general* and apparently takes it as a leading case on *general*

power. The act there construed was practically the same as the present act. Everybody must admit that the old act and the new act gave the power to regulate the speed of 1, animals, 2, vehicles, 3, cars and 4, locomotives. These are four specific matters about which the municipality is given power to regulate—specific is defined in Webster's New International Dictionary as, "precisely formulated or restricted; specifying; definite or making definite; explicit; of an exact or particular nature"; and general is defined as, "not restrained or limited to a precise import or application; not specific; not entering into detail or minutiae." Apply these definitions to the terms of the statute and you must say that these are four specific powers. The Supreme Court of Illinois says that the powers in Section 23-91, where the powers are defined are specific powers, or "a special grant to the city," *Aliotta* case, p. 422.

If the statute had given the right to regulate speed alone, without specifying the kinds of instrumentalities that the municipality could regulate, then the power would have been general.

The Court of Appeals had cited to it the case of *City of Geneseo* v. *Illinois Northern Utilities*, 363 Ill. 89; 1 N. E. (2d) 392, known as the first *Geneseo* case and *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N. E. (2d) 26, known as the second *Geneseo* case. These cases involving the same parties had the same question, viz., the right of the city to control its streets for the purpose of granting franchises to public utilities. The first case held that general power granted by Public Utilities Act to Commerce Commission overcame the specific powers granted to City of Geneseo by the Cities and Villages Act. In the second *City of Geneseo* case, the court specifically said that it no longer adhered to *City of*

Geneseo v. *Illinois Northern Utilities Co.*, 363 Ill. 89 and no longer adhered to *Chicago Motor Coach Co.* v. *City of Chicago*, 337 Ill. 200, 169 N. E. 22, which is cited as an authority by the Court of Appeals and announced the rule after referring to specific sections of Public Utilities Act that unless specific power is found in the Public Utilities Act, the Commission would not have the power to act. The opinion of the Court of Appeals pays no attention to this case. The second *Geneseo* case overcomes the cases of *City of Altamont* v. *Baltimore and Ohio R. Co.*, 348 Ill. 339; 180 N. E. 809, *Chicago Motor Coach Co.* v. *City of Chicago*, 337 Ill. 200, 169 N. E. 22, and *Village of Atwood* v. *Cincinnati, I. & W. R. R. Co.*, 316 Ill. 425, 147 N. E. 449, because in each of these cases the Court struck down specific grants of power to a municipality on the strength of general power in the Commission, all of which specific powers are now included again in the Revised Cities and Villages Act.

Without quoting at length from the second *City of Geneseo* case, it is petitioner's desire to say that this case reviews the powers granted to the Commerce Commission very thoroughly, pages 520 and 521, in the following language:

> "Examination of the Public Utilities Act shows an intention upon the part of the legislature to grant general supervision by the Commerce Commission over all classes and types of utilities, and to give specific and express authority in certain instances where a general power might be ineffective as conflicting with specific authority vested elsewhere. This is apparent from the framework of the act. The first seven sections are devoted to organization of the Commission; the eighth section is the one which vests the power in the following language: 'The Commission shall have general supervision of all public utilities, except as otherwise provided in this act.' The statute also lays down certain duties upon the part of utilities by sections 32 to 40, and then the act pro-

vides from sections 41 to 58, inclusive, certain specific powers which the Commission may exercise after a hearing, among which are: To establish rates (Sec. 41, 42); file objections with Interstate Commerce Commission to adjust discriminatory interstate rates (Sec. 43); power to order the railroads to make connections with each other (Sec. 45, 46); power over or right to require continuous lines of communication (Sec. 47); power to acquire subways, conduits, or compel the use thereof (Sec. 48); authority to direct the nature of the facilities to be used by utilities (Sec. 49); to compel the building of extensions (Sec. 50); to regulate the number of trains or cars to be used (Sec. 51); regulations for temporary storage and weighing (Sec. 52); what may be included in the service contracts of customers (Sec. 53); power to establish rules to promote safety and to require the use of protective signals and devices (Sec. 57); control over grade crossings (Sec. 58); all of which specific powers are fully defined and set forth in the enumerated sections of the act,"

and again on p. 531:

"When we see the care the legislature has taken to give the Commerce Commission general supervision over utilities, and has granted a special power to it in each case where the general authority of the city would otherwise prevail, the absence of power granted by express words to control the occupancy of streets, except in accordance with a franchise issued by the city, is of the greatest significance. We are of opinion the power claimed by appellees to exist in the Commerce Commission has not been given by the legislature."

The Court said, speaking of previous decisions,—

"The legal proposition to be adduced from these decisions, and which has become *stare decisis*, is that wherever there is a specific power or authority granted to the Commerce Commission, which is in opposition to a like or similar power granted to the city or

> village, the former will prevail, and the latter, without express repeal, will become ineffective. To this extent, and this extent only, has the principle established in the above cases become *stare decisis.*" P. 517.

This case was decided Nov. 24, 1941, before the Revised Cities and Villages Act became effective, and was of necessity decided under the Cities and Villages Act of 1870, as amended. The *City of Witt* case (speed) was decided in 1927 and the Court bases the opinion on the power granted under Section 57 of the Public Utilities Act (Statute Section 61). Petitioner asserts that not one word of this section gives any power to regulate the speed of a locomotive and train of cars in the corporate limits and further asserts that said section gives no power over the regulation of speed anywhere, except the very limited power concerning speed in the following language:

> "The Commission may also prescribe the rate of speed for trains or cars passing over defective tracks, bridges, trestles, or other structures until repaired or new construction required is made."

It is a familiar well settled rule of statutory construction in Illinois that where there is found in the statute a particular enactment, it is held to be operative as against the general provisions on the subject in the same act or in the general law relating thereto. *The People* v. *Wabash R. R. Co.,* 395 Ill. 520, 540; 70 N. E. (2d) 718, 728. It is believed under this authority, a failure to give to Commerce Commission a specific right to regulate speed at any place, except over defective tracks, bridges, trestles or other structures and then only until repairs are made, precludes any further speed regulation authority or power in the Commission; and likewise this position is further fortified by the case of *People ex rel. Hansen* v. *Collins,*

351 Ill. 551, 555; 184 N. E. 641, 642, where the rule citing this Court is stated as follows:

> "It is a general principle of statutory construction that the enumeration of certain things implies the exclusion of all others."

It is submitted that the *Aliotta* case in itself decides the question, that the second *City of Geneseo* case also decides the question when read in the light of Revised Cities and Villages Act; and that the *City of Witt* case no longer states the law. That the present rule in Illinois is pointed out and followed in the dissenting opinion (See also legal propositions cited in brief II, III, IV, V).

II.

The Judgment of the Court of Appeals Is Erroneous in the Following Particulars, First, It Is Based Upon Exclusive Power in the Commission, When in Fact in the Light of Present Legislation and Later Definite Rules by Decisions of the Supreme Court for Construction of the Public Utilities Act, There Is in Fact, When the Issue Herein Is Examined, No Exclusive Power and in Fact No Power Whatsoever; Second, There Is Clear Repugnancy Between the Revised Cities and Villages Act, the Latest Expression of the Legislature, and the Public Utilities Act, the Older Legislation, and That Therefore the Public Utilities Act Controls, When the Law Is, That Under Such a Circumstance of Legislation, the Later in Point of Time Must Control and If Repugnancy Exists That Cannot Be Reconciled, Then the Older Legislation Must Fail; Third, That Courts Have the Power to Construe the Public Utilities Act as Giving Exclusive Grants of Power, Irrespective of What the Latest Expression of the Legislature Is; Fourth, That Section 23-28 Is a Gen-

eral Statute, When in Fact, It Is a Specific Statute Granting Specific Power; Fifth, That the Aliotta Case Says That If There Is Repugnancy Between Two Grants of Power, the Older in Point of Time Shall Prevail, Which Case Announces No Such Rule of Law; Sixth, Because It in Effect Says That the Legislature Had No Meaning in the Language It Used by the Inclusion of the First Sentence in Section 87-1; Seventh, That There Is No Residuum of Power for the Use of a City or Village, When in Fact Upon Scrutinizing Examination of Public Utilities Act, There Never Was Any Power in the Commerce Commission, Except What Might Be Read in Under General Power to Regulate, When Under the Exact Wording of the Public Utilities Act, the Limited Expression Concerning Speed of Trains, Excludes Any Further Power of Regulation; and Eighth, That Petitioner's Contention in the Court of Appeals Loses Sight of the Controlling Basis on Which the Aliotta Case Is to Be Distinguished, When It Cites Certain Wording in the Aliotta Case, the Cited Words of Which If Scrutinized Closely, Bear Out Petitioner's Contention.

1. The First Reason.

The majority opinion of the Court on the first premise that leads to its conclusion and in the third paragraph says that Section 57 (61) is an exclusive grant of power and speaks of this exclusive grant of power as one of broad scope. We invite this Court to read Section 57. There are certain specific powers granted, but the powers granted fail to include the right to regulate speed of trains, except in a very limited way, viz.—over defective tracks, etc., until repairs can be made. See *Aliotta* case, second *City of Geneseo* case, *People ex rel. Hansen* v. *Collins, supra* and *People* v. *Wabash R. R. Co., supra.* We invite the Court also to read Section 58 (62) Appendix

hereto. It is wholly void of any power to regulate speed. The Court also says in paragraph 4 that the legislature gave a specific grant of power in the Public Utilities Act to the Commerce Commission to regulate the speed of trains and cites in support thereof the *City of Witt* case. The Supreme Court of Illinois does say that the legislature created the Commerce Commission "and vested it with general supervision of all public utilities, including the power by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to require the performance of any act which the health or safety of its employees, passengers, customers or the public may demand (laws of 1921, sec. 57, p. 733) and then it strikes down the speed ordinance. It does not point out any specific power in Sec. 57 giving to the commission any power to regulate the speed of trains. As has been said above, we have to concede that the speed ordinance of *City of Witt* was stricken. This decision was before the Supreme Court of Illinois decided the second *City of Geneseo* case, in which case it overruled. *Chicago Motor Coach Co.* v. *City of Chicago* and first *City of Geneseo* case, both cited in brief, which cases cited as authorities the *City of Witt* case. The Court of Illinois then adopted the rule that specific authority must be found in the Public Utilities Act. It is believed that under the light of second *City of Geneseo* case, the *City of Witt* case is no longer authority because the basis of the decision has been overruled. In all other cases cited in this paragraph of the opinion, and especially in the *City of Altamont* and *Village of Atwood* cases, the Court found that there was specific power under Section 58 (62), but in this case when you apply the rule of

specific designation as excluding non-specified power you fail to find anything said about crossing watchmen, unless it comes under the word "protection". However, the authority to provide for crossing watchmen is again given under Revised Cities and Villages Act in Article 23-24. *The Chicago, N. S. & M. R. Co.* v. *City of Chicago,* 331 Ill. 360, only holds that after a city has granted a franchise, the city by such grant gives the right to locate tracks in a street, and that after the grant for location, the power never existed in a city to supervise, regulate or control any contractual rights executed by the defendant utility and another utility. In the *Northern Trust Co.* case, a police power ordinance was involved and the police power ordinance was passed under general authority. No specific authority to pass the ordinance was found. All of these cases only decide a state of facts as they exist when the decision is made.

City of Geneseo v. *Illinois Northern Utilities Co.,* 378 Ill. 506, 519; 39 N. E. (2d) 26, 33.

2. The Second Reason.

The Court of Appeals says in the 6th and 7th paragraphs of the opinion, in speaking of the *Aliotta* case, "Of the cases there relied on by appellants the Court said, 'There was clear repugnancy in these cases; there is no repugnancy in this case.' Thus the Court held only that Sec. 87-1 operates to prevent a grant of authority to a department of the State government from effectuating a repeal by implication of a prior grant of like authority to municipalities, absent repugnancy between the two statutory grants. In such case the power may be exercised concurrently by the two governing bodies. The touchstone of this decision, therefore, is want of repugnancy in the concurrent exercise by two distinct agencies of power over

the same subject matter." It is the humble opinion of petitioner that the *Aliotta* case does not hold this proposition. When the Court of Appeals quoted the Court of Illinois as above quoted, the Court was speaking of *City of Chicago* v. *Jensen*, 331 Ill. 129, *Wilkie* v. *Chicago*, 188 Ill. 144, and *City of Chicago* v. *Burke*, 226 Ill. 91, cases relied on by *Aliotta* and others, holding that between *general* authority granted to a city or village and specific authority granted to a branch of the state government, there was repugnancy between the specific grant of authority and a general grant of authority. I quote: "There was not present in any of those cases a *special* grant to the city, and a like grant (special) of power to the State." The Court further held that regulation of barber shops comes under the general police power, which it has been many times held can be concurrently exercised by both; and finally held that the power granted a municipality (Sec. 23-91) was not repealed by implication when considered with Section 87-1. The Court of Appeals imports to the Supreme Court of Illinois a holding that it could in no event make, because it has announced on many occasions, that if repugnancy exists, the last legislation controls, 1941 as against 1921. *City of Geneseo* v. *Illinois, Northern Utilities Co.*, 378 Ill. 506, 529; 39 N. E. (2d) 26, 37.

3. The Third Reason.

The Courts do not have the power to judicially construe the Public Utilities Act as giving exclusive grants of power, irrespective of subsequent legislation that cuts down what has been said to be an exclusive grant of power. The word "exclusive" is found nowhere in the Public Utilities Act, and the judicial construction as such has been cut down to size by the legislature in the Revised Cities and Villages Act when by Sec. 23-28 and Sec. 87-1, the first

says that specific power is given to municipalities and the latter says that if in case of conflict, the provisions of the later act shall be considered either as an alternative or additional power. *Aliotta* v. *City of Chicago,* p. 421, 422. Again we call attention to paragraph 8 of the opinion of the Court of Appeals and I quote:

> "As recently as 1947, the Court has held that the Public Utilities Act covers the entire subject of Public Utility Regulation. *Illinois Central R. Co.* v. *Illinois Commerce Commission,* 397 Ill. 323 at 329, 74 N. E. (2d) 545 at 548."

This case is only authority for what it decides on the facts therein involved, *i. e.,* the right of the commission to discontinue an agency railroad station, and we remark that the Supreme Court of Illinois did not say that the Public Utility Act gave to the commission the right to control every phase of and regulate a municipality; nor did the Court in this case have before it Sec. 23-28 and 87-1 of Revised Cities and Villages Act.

4. The Fourth Reason.

The Court of Appeals implies that Sections 23-38 and 87-1 provide for general grants of power and that therefore, an ordinance authorized by Sections 23-28 and 87-1 must yield to the so-called exclusive power given in the Public Utilities Act. These sections are not general grants of power, but are specific (special) grants of power as previously pointed out. *Aliotta* v. *City of Chicago.*

5. The Fifth Reason.

The effect of the opinion of the Court of Appeals is to say that if repugnancy exists between the two acts, the Public Utilities Act must prevail and the Revised Cities and Villages Act must fall. The Public Utilities Act was

passed in 1913, was revised in 1921 and the Revised Cities and Villages Act was passed in 1941, effective January 1, 1942. The law is that the latest in point of time prevails, if repugnancy exists. Second *City of Geneseo* case.

6. The Sixth Reason.

It is to be remembered that Illinois Commerce Commission has never entered an order concerning the speed of trains. The Court of Appeals implies that there is a conflict between Cities and Villages Act and Public Utilities Act in that there might be a possibility of conflict of power. When no conflict of power is discernible under the facts in this case, the Court cannot say that conflict exists. As above pointed out the powers given in the Revised Cities and Villages Act are special powers and under the rules as above pointed out, if there are general powers granted and certain limited designated special power also granted by the Public Utilities Act, the limitation excludes any other granted power in general terms. Yet the Court of Appeals says that when Sec. 87-1 is examined, it "expressly disavows any legislative intent that the Revised Act should in any way operate in derogation of the powers of the Commerce Commission and the scope of those powers must be found in decisions of the Courts of Illinois construing the Public Utilities Act." This amounts to saying that the Courts of Illinois make the laws. Sec. 87-1 contains two sentences. The first sentence tells the legislative intent as to how the courts are to construe the Revised Cities and Villages Act, and that if there is a conflict, the powers are to be considered cumulative in effect and to be considered as an alternative or additional power. The second sentence shows a definite intention on the part of the legislature that repeal by implication shall not result, nor shall any power be impaired, altered or modified

when the power in fact exists; and that under the law the police powers that are lodged in a municipality and in a department of the State Government, are to be exercised concurrently. *Aliotta* case p. 422. To construe 87-1 as done by the Court of Appeals, is to effectively eliminate the first sentence of 87-1.

7. The Seventh Reason.

The Court of Appeals says there remains no residuum of power to a municipality. It says this without having regard to the Supreme Court of Illinois and the rules it lays down in the second *City of Geneseo* case. The residuum of power is found in Sections 23-28 and 87-1 of Cities and Villages Act, as above quoted and referred to.

8. The Eighth Reason.

The Court of Appeals says it believes that the petitioner's contention, *i. e.*, concurrent exercise by both the municipality and Commerce Commission, loses sight of the controlling basis on which the *Aliotta* case must be distinguished from the case at bar. The *Aliotta* case holds that if there is a conflict of power, that Section 87-1 provides the provisions of the entire Revised Cities and Villages Act, shall be cumulative in effect and the powers granted are to be considered as an alternative or additional power and not as a limitation upon any other power granted to a municipality and that under the last sentence, the supposed conflict between the Act and the Revised Barbers Act, are to be exercised concurrently. Petitioner believes that the construction given 87-1 by the Court of Appeals is not that given it by the Supreme Court of Illinois.

III.

It Is the Duty of Courts to Interpret the Law. The Statute Sec. 23-28 and 87-1 Speak the Intention of the Legislature Plainly. In Such Case Rules of Construction Only Govern When the Legislature Has Not Expressed an Intention. There Is No Vested Right in a Public Statute and the Legislature Has the Right to Change or Repeal It at Will.

The Court of Appeals has construed the new Revised Cities and Villages Act by the application of rules of construction. It is the duty of the Court of Appeals to first examine the statute and determine in the first instance what the meaning is from the words of the Statute itself. We believe that an inspection of the Statutes involved show a plain and unambiguous intention on the part of the legislature to again invest cities and villages with the power to regulate the speed of trains within the corporate limits. Rules of construction only govern, when the legislature has failed to manifest an intention and where the legislature specifically manifests an intention, then the legislative intention governs; the rules of construction are only to be observed when such construction would not be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. *People* v. *Lindheimer*, 371 Ill. 367, 376, 21 N. E. (2d) 318, 322. We believe that the Court of Appeals has construed Sec. 87-1, not in the light of what it says, but by the application of rules of construction which obviate the plain intention and import of the first sentence of Sec. 87-1 which says that in case of conflict with any other statute shall be an alternative or additional power. This sentence is written out of said section by the application of the rule of repeal by implication. This rule, the Court of Appeals was not permitted

to follow. *Aliotta* v. *Chicago, supra; City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 532, 533, 39 N. E. (2d) 26, 39. Repeals by implication are not favored. It is only when there is clear repugnancy and both acts cannot be carried into effect that the former is repealed. Statutes which are seemingly repugnant should, if possible, be so construed that the subsequent act may not operate to repeal by implication the earlier act. Where a special act is repugnant to or inconsistent with a prior general statute a partial repeal of the latter act will be implied or exception grafted upon the general statute. In determining whether one statute is repugnant to another the court should consider its several parts in connection with correlated sections *in pari materia*. The repeal by implication of one act by a later act is not effected by mere conflicts or inconsistencies between them, but only where the carrying of the later act prevents the enforcement of any part of the former. To the extent they are in conflict the first act is repealed, but the parts of the first act not affected remain in full force and effect. *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 529, 39 N. E. (2d) 26, 37.

We believe that the plain import of Sec. 87-1 is to reinvest in cities and villages the power denied by the Court of Appeals; and we further believe that the plain intention of this section is not to impair or take away any power given by Public Utilities Act to Illinois Commerce Commission, if any power to regulate speed, it ever had. We further believe this asserted power was never vested in the Commission under the rules of construction as announced in the second *City of Geneseo* case, but that if this Court finds the power in the Commission, then the powers must be exercised concurrently.

We further believe that the Court of Appeals by the

majority opinion as pointed out in the dissenting opinion, has failed to recognize that both bodies in which the power is lodged are creatures of the legislature entirely under the control of the legislature. That the legislature has the undoubted right to repeal the granted power at will because there is no vested right in a public statute in individuals; that if the convenience of the State induces amendment or repeal, individuals have no right to complain. *People* v. *Lindheimer,* 371 Ill. 367, 373, 21 N. E. (2d) 318, 322; *Smolin* v. *Industrial Commission,* 324 Ill. 32, 36, 154 N. E. 441, 443. Thus the Court of Appeals has denied to the legislature of Illinois, its undoubted legislative right.

Conclusion.

It is therefore, most respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

Dated this 16th day of March, 1954.

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APPENDIX.

The opinion and dissenting opinion of the United States Court of Appeals for the Seventh Circuit rendered January 7, 1954 in Case No. 10945 entitled Victor Hemphill, as Executor of the Last Will and Testament of Joseph Bostick Liston, deceased, Appellant, *vs.* Wabash Railroad Company, Appellee, are as follows:

Before DUFFY, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This action was brought by the Executor of the Estate of Joseph Bostick Liston, Deceased, to recover damages for the death of the decedent which was alleged to have been caused by the negligence of defendant in running its train across a grade crossing, in the Village of Raymond, Illinois, in violation of an ordinance of that village limiting the speed of trains within its corporate limits to ten miles per hour. On defendant's motion to dismiss, on the theory that the ordinance was invalid, the District Court entered judgment for defendant. The sole question presented by this appeal is as to the validity of this ordinance.

As a back-ground in considering the issue presented, it is well, we think, to observe the basic attributes of and limitations upon municipalities. Cities and villages are corporate entities existing under and by virtue of state law and, therefore, are possessed of no inherent power independent of statute. Thus, when an act of a municipal corporation is called into question the burden is on the municipality to show a statute authorizing its exercise of the power, and any doubt as to the existence of this power should be resolved against it. *City of Chicago* v. *Chicago Great Western R. Co.,* 348 Ill. 193, 180 N. E. 835.

Because of this elemental conception of the municipality as a creature of strictly limited, delegated powers, the existence of the authority here said to reside in the Village, is clouded with doubt at the threshold of our consideration. By the Cities and Villages Act of 1872, the General Assembly expressly delegated to municipalities the power to regulate the speed of "locomotives" within their corporate limits. I.R.S. c. 24, Art. V, Sec. 21 (1939). In 1921 the present Public Utilities Act was enacted creating the Commerce Commission and vesting in it general power to supervise and regulate public utilities, I.R.S. c. 111⅔, Sec. 1 *et seq.* (1951), including the power to require every public utility to maintain and operate its property in such manner as to promote and safeguard the health and safety of the public. Section 57 (I.R.S. c. 111⅔, Sec. 61). It is unnecessary to comment further on the broad scope of this statutory grant of exclusive power other than to point out that an examination of the statute discloses that the Commission is given supervisory and regulatory power over every phase of public utility operation, and that every utility is enjoined to abide by requests and orders of the Commission. See *e. g.*, Sections 8, 8a, 9, 10a and 61.

Faced with the conflict created between the Cities and Villages Act, which in general terms empowered cities to regulate the speed of railway trains, and the specific grant of power to the Commerce Commission to regulate the operation of public utilities, the Supreme Court of Illinois held invalid a city ordinance regulating the speed of trains operating within its corporate limits. *City of Witt* v. *Cleveland, C. C. & St. L. Ry. Co.*, 324 Ill. 494, 155 N. E. 325. The court said at 496: "By this Act the General Assembly, in its discretion, withdrew from cities and villages the power theretofore exercised by them with reference to the speed and operation of railway trains and such power is now vested in the Commerce Commission, another agency

of the government." (Citing authorities.) And, prior to 1941, this same interpretation of the Public Utilities Act was applied repeatedly to invalidate municipal ordinances enacted by authority of the general provisions of the Cities and Villages Act to regulate the operation of Public utilities. *City of Altamont* v. *Baltimore & O. R. Co.*, 348 Ill. 339, 180 N. E. 809; *City of Chicago* v. *Chicago Great Western R. Co.*, 348 Ill. 193, 180 N. E. 835; *Chicago Motor Coach Co.* v. *City of Chicago*, 337 Ill. 200, 169 N. E. 22; *Chicago, N. S. & M. R. Co.* v. *City of Chicago*, 331 Ill. 360, 163 N. E. 141; *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422; *Village of Atwood* v. *Cincinnati, I. & W. R. Co.*, 316 Ill. 425, 147 N. E. 449.

In 1941, however, the General Assembly enacted the Revised Cities and Villages Act, I. R. S. c. 24, Sec. 1, *et seq.* (1951), which included a substantial reenactment of Article V, Section 21 of the prior act, viz., municipalities were again granted the power "To regulate the speed of animals, vehicles, cars, and locomotives." Section 23-28. Section 87-1 of the Act provides that "The provisions of this Act shall be cumulative in effect and if any provision is inconsistent with another provision of this Act or with any other Act not expressly repealed by Section 87-4 it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities. But the provisions of this Act shall not be considered as impairing, altering, modifying, or repealing any of the jurisdiction or powers possessed by any department, board, commission, or officer of the State Government immediately prior to the effective date of this Act."

Plaintiff argues that the legislature, by enacting these provisions, restored to municipalities the power to regulate the speed of trains to be exercised concurrently with a like power vested in the Commerce Commission. To sustain

this contention he relies principally on *Aliotta* v. *City of Chicago,* 389 Ill. 418, 59 N. E. 2d 829, in which the court held that the power granted to cities in 1935 to regulate barbers and barber shops was not recalled by a statute enacted in 1937 delegating to the Department of Registration and Education power to adopt rules to regulate the sanitation of barber shops and barber schools. Of section 87-1 of the Revised Cities and Villages Act the court said at 421-422, 59 N. E. 2d at 830-831, "These statutory provisions negative the theory that the power of the city to license or regulate barbers has been repealed by the act of 1937. Section 2 of the Act relating to construction of statutes, Ill. Rev. Stat. 1943, chap. 131, par. 2, providing that a reenactment of a former statute, as far as it is the same, shall not be considered a new enactment, does not apply, for the reason that, while the barber provision in the 1941 Revised Cities and Villages Act is the same as that found in the laws of 1935, it has, in addition, attached and read into it a part thereof that, in case of conflict, the provision in the later act shall be considered either as an alternative or additional power." Of the cases there relied on by appellants, the court said, "There was clear repugnancy in those cases; there is no repugnancy in this case."

Thus the court held only that Section 87-1 operates to prevent a grant of authority to a department of the state government from effectuating a repeal by implication of a prior grant of like authority to municipalities, absent repugnancy between the two statutory grants. In such case the power may be exercised concurrently by the two governing bodies. The touchstone of this decision, therefore, is want of repugnancy i the concurrent exercise by two distinct agencies of power over the same subject matter. Only a strained interpretation of this opinion would require, or indeed support, we think, a like result where,

by the statutory grant to one of the competing agencies, the legislature has evinced an intention to delegate to that agency exclusive power over the subject matter. In any case, the determinative inquiry becomes one of whether in the light of judicial construction of the specific grant to the department of the state government, here, the Commerce Commission, any residuum of power remains which municipalities may exercise by virtue of the general grant of the Act of 1941. If none is found, the existence of a concurrent power exercisable by the municipal body is negated.

Plaintiff's contention, we believe, loses sight of this controlling basis on which the *Aliotta* case must be distinguished from the case at bar. The Barber's Act has never been construed as an exclusive grant to the Department of Registration and Education of power to regulate barbers, while the courts have repeatedly construed the Public Utilities Act as an exclusive grant of regulatory power to the Commerce Commission and its predecessor, the Public Utilities Commission. Compare, grant of power in I. R. S. c. 16¾, Sec. 14-40 with that in I. R. S. c. 111⅔, Sections 8, 61 Compare *Aliotta* v. *City of Chicago, supra,* with *Chicago Motor Coach Co.* v. *City of Chicago,* 337 Ill. 200, 169 N. E. 22. Thus, in the *Chicago Motor Coach* case, 337 Ill. at 209, 169 N. E. at 26, the court declared: "The language of the Act is sufficiently comprehensive to subject every phase of the relations between every public utility and the public to the supervision and regulation of the Public Utilities Commission. * * * (The Court here summarizes the scope and nature of the powers granted to the Commission by the Act of 1913.) These provisions certainly covered the whole field of service of every utility. They left no room for the exercise of authority of any other body." Again in *City of Chicago* v. *Chicago Great Western R. Co.,* 348 Ill. 193, 199-200, 180 N. E. 835, 838, the court said: "It would be

impracticable to vest in two independent authorities the power to regulate these things (scales and weights of freight shipments) and, since by the later law the railroad company was required to observe the orders, rules, and regulations of the commission, no room was left for the exercise of concurrent authority by the city. This has been the decision in a number of cases in which the question of the power of supervision, whether by the Commerce Commission or by the officers of cities, has arisen." Citing, *Atwood, Northern Trust, City of Witt, Chicago, N. S. & M. R. Co.* and *Chicago Motor Coach* cases, all *supra.* As recently as 1947 the court has held that the Public Utilities Act covers "the entire subject" of public utility regulation. *Illinois Central R. Co.* v. *Illinois Commerce Commission,* 397 Ill. 323 at 329, 74 N. E. 2d 545 at 548.

We are dealing, therefore, with a body possessing what has been judicially construed as exclusive powers over the regulation of public utilities. No residue of power remains with respect to this subject matter which any other agency may exercise. The existence of the exclusive grant necessarily precludes concurrent jurisdiction residing in any other body. Thus, the question whether we are to consider Section 23-28 of the Revised Cities and Villages Act, a continuation of the prior provisions of the Act of 1872, and subject, therefore, to the limitations of prior judicial construction, *Lamere* v. *City of Chicago,* 391 Ill. 552, or a new enactment becomes purely academic. In either event, the result must be the same. The second sentence of Section 87-1 expressly disavows any legislative intent that the Revised Act should in any way operate in derogation of the powers of the Commerce Commission, and the scope of those powers must be found in decisions of the courts of Illinois construing the Public Utilities Act.

The argument that the Village possesses concurrent power with the Commission to regulate the speed of trains passing through its corporate limits must of necessity operate in derogation of the powers lodged exclusively in the commission. This is the type of repugnancy which the court held to be nonexistent in the *Aliotta* case, but which the court there indicated must, if it exists, require the municipal ordinance to be stricken down.

The judgment dismissing the amended complaint must be and is affirmed.

SWAIM, *Circuit Judge,* Dissenting. I think that the interpretation by the Supreme Court of Illinois of the Revised Cities and Villages Act of 1941 in *Aliotta* v. *City of Chicago,* 389 Ill. 418, must be followed by this court and that if followed we must hold that the power granted to cities in the 1941 Act to regulate the speed of trains within their municipal boundaries must be construed "• • • either as an alternative or additional power granted to or possessed by municipalities."

I agree, of course, that the municipalities are created by the state legislature and have only such powers as the legislature may see fit to give. But we must also agree that this is likewise true of the Commerce Commission, also created by the state legislature. Powers of municipalities and of the Commerce Commission may be given, may be taken away and may be again given at any time the legislature sees fit to do so. I am in complete agreement that prior to the enactment of the Revised Cities and Villages Act the power of municipalities to regulate the speed of trains within their borders had been withdrawn by the legislature having given this power to the Commerce Commission.

But in the *Aliotta* case the Supreme Court of Illinois

held that a statute giving to cities the power to regulate and license barbers and a later statute giving like power to a department of the state must be read in the light of the Revised Cities and Villages Act which again granted to cities the power to regulate barbers, and provided in Section 87-1:

> "The provisions of this Act shall be cumulative in effect and if any provision is inconsistent with another provisions of this Act or with any other Act not expressly repealed by Section 87-4 it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities. But the provisions of this Act shall not be considered as impairing, altering, modifying, or repealing any of the jurisdiction or powers possessed by any department, board, commission or officer of the State Government immediately prior to the effective date of this Act."

The court said, page 421, that "these statutory provisions" negative the theory that the power of the city to regulate barbers had been repealed and held that this provision of the Act, together with the provisions copied from the earlier Cities and Villages Act giving cities the regulatory power over barbers, should "be considered either as an alternative or additional power." After noting that the regulation of barber shops came under the general police power, the court said that it had many times held that a municipality might exercise police powers concurrently with the State and concluded that the city ordinance in the exercise of such concurrent police power was valid.

It is true that the *Aliotta* case involves a different statute (the Barbers Act) which the Illinois Supreme Court had never held to have taken away from the cities their power to regulate barbers, a power which had been granted by an earlier act. There, as here, however, we have the

alleged conflict between a broad state statute, giving to a state department certain police powers, and a city ordinance purporting to exercise police powers in the same field by virtue of a statute enacted before the statute giving these powers to the state department.

The reasoning of the cases decided prior to the Revised Cities and Villages Act on the subject of repeal by such a conflict makes it perfectly clear, I think, that had the Barbers Act and the prior conflicting city ordinance been presented to it prior to the Revised Cities and Villages Act, the Supreme Court of Illinois would have held that the prior grant to the cities had been repealed and that the ordinance was invalid. In the *Aliotta* case the ordinance was saved only by the interpretation by the court of Section 87-1 of the Revised Cities and Villages Act, by the fact that the court, page 421: "attached and read into it a part thereof that, in case of conflict, the provision in the later act shall be considered either as an alternative or additional power."

The defendant has pointed out that when the Barbers Act was amended in 1947, and again in 1949, the legislature provided, by Section 62 (Ch. 16⅔, Sec. 14.96, Ill. Rev. Stat. (1951)), that nothing in the Act should limit or repeal any power of municipalities over barbers and that there is no such provision as this in the Public Utilities Act. But the amendment of the Barbers Act in 1947 and 1949 could not have influenced the Supreme Court of Illinois in the *Aliotta* case which was decided in 1945.

We must assume that the second sentence of Section 87-1 of the Revised Cities and Villages Act was also considered by the Supreme Court of Illinois in the *Aliotta* case, and that the court held that the grant by the state to the municipalities of police power over barbers, to be exercised concurrently with the Department of Registration and

Education, did not impair, alter, modify or repeal any of the jurisdiction or powers possessed by that Department.

I think that since the Supreme Court of Illinois has construed the Revised Cities and Villages Act we are bound by that construction regardless of how we might have construed the Act had there been no such prior construction.

We should, therefore, reverse the judgment of the District Court.

Article 1-1, Article 23-1, Article 23-28, Article 23-106, Article 87-1, Article 87-4 and Article 87-5 of Chapter 24, Illinois Revised Statutes, 1953, Volume I, and also found in Smith Hurd Illinois Annotated Statutes, same chapter and section numbers, are as follows:

REVISED CITIES AND VILLAGES ACT.

AN ACT concerning cities, villages, and incorporated towns, and to repeal certain Acts herein named. Act approved Aug. 15, 1941. L. 1941, vol. 2, p. 19. Eff. Jan. 1, 1942.

ARTICLE 1-1.

1-1. Short title.) This Act shall be known and may be cited as the Revised Cities and Villages Act.

ARTICLE 23-1.

23-1. Grant of powers.) The corporate authorities of a municipality shall have the powers enumerated in Sections 23-2 to 23-112 inclusive.

ARTICLE 23-28

23-28 Streets—Speed of vehicles.) To regulate the speed of animals, vehicles, cars, and locomotives.

ARTICLE 23-106.

23-106. Ordinances and rules to execute powers—Limitations on punishments.) To pass all ordinances and make all rules and regulations, proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper. No fine or penalty, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall exceed $200.00 and no imprisonment shall exceed six months for one offense.

ARTICLE 87-1.

87-1. Act confers cumulative powers without impairing powers of state agencies.) The provisions of this Act shall be cumulative in effect and if any provision is inconsistent with another provision of this Act or with any other Act not expressly repealed by Section 87-4 it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities. But the provisions of this Act shall not be considered as impairing, altering, modifying, or repealing any of the jurisdiction or powers possessed by any department, board, commission, or officer of the State government immediately prior to the effective date of this Act.

ARTICLE 87-4.

87-4. Acts repealed.) Omitted.

This section repealed enumerated acts and parts of acts relating to cities and villages. Article XII of Act 1872, April 10, L. 1871-72, p. 218, as amended, constituting sections 166-207g of this chapter, is repealed if and when Article 21 of the Revised Cities and Villages Act is adopted by the City of Chicago.

ARTICLE 87-5.

87-5. Effective date.) This act shall become effective January 1, 1942.

Sections 8, 8a, 9, 10a, 61 and 62 of the Public Utilities Act of Illinois Revised Statutes, 1953, Volume 2, Smith Hurd Illinois Annotated Statutes, same chapter and section numbers, are as follows:

SECTION 8.

8. Supervision of utilities—Examination rules and regulations—Report of Commission.) The commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the

provisions of this Act and any other law, with the orders of the commission and with the charter and franchise requirements.

In case any public utility is engaged in carrying on any business other than that of a public utility, which other business is not otherwise subject to the jurisdiction of the commission, such public utility in respect of such other business shall be subject to inquiry, examination and inspection by the commission in the same manner as the public utility business in so far as such inquiry, examination and inspection may be necessary to enforce any provision of this Act. The determination of the commission that a necessity for any regulation of non-public business of a public utility exists shall be prima facie evidence of the fact in any action in a court of this State to enforce or set aside an order or ruling of the commission.

The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with commissions and any and all agencies dealing with public utilities of other states and of the United States on any matters relating to public utilities.

The commission shall have power to adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings, and to alter and amend the same.

All proceedings of the commission and all documents and records in its possession shall be public records, except as in this Act otherwise provided. The commission shall make an annual report to the Governor on or before the first day of December in each year, which shall contain copies of all orders issued by the commission which it deems of special importance or general significance, and

any information in the possession of the commission which it shall deem of value to the people of the State.

The commission shall conduct a hearing and take testimony relative to any pending legislation with respect to any person, corporation or matter within its jurisdiction, if requested to do so by the Governor, the General Assembly or by either branch thereof, and shall report its conclusions to the Governor or the General Assembly, as the case may be. The commission may also recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest. The commission shall, at such times as the Governor shall direct, examine any particular subject connected with the condition and management of public utilities, and report to him in writing its opinion thereon with its reasons therefor.

SECTION 8a.

8a. Jurisdiction over stockholders, affiliated interests—Disclosure of identity of owner of substantial interest.) (1) The Commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the Commission to such extent as may be necessary to enable the Commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including ac-

cess to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section, the phrase "affiliated interests" means:

(a) Every corporation and person owning or holding directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

(b) Every corporation and person in any chain of successive ownership of ten per centum or more of voting capital stock;

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

(d) Every corporation, ten per centum or more of whose voting securities is owned, directly or indirectly by such public utility;

(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock;

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

(g) Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even

though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

(h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the Commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and consented to by the Commission. Provided, however, that the Commission shall have authority to condition such approval in such manner as it may deem necessary to safeguard the public interest. Provided, further, that the Commission shall be empowered to except from the provisions of this sub-paragraph contracts or arrangements made in the ordinary course of business covering normal requirements at not to exceed standard

or prevailing market prices. If it be found by the Commission, after investigation and a hearing, that any such contract is not in the public interest, the Commission is hereby authorized to disapprove such contract. Every contract or arrangement not consented to or excepted by the Commission as provided for in this section shall be void.

The consent to any contract or arrangement as required above, shall not constitute approval of payments thereunder for the purpose of computing expense of operation in any rate proceeding.

(4) The Commission shall have authority by general rules applicable alike to all public utilities affected thereby, to waive the filing and necessity of approval of contracts and arrangements described in subparagraph (3) of this section, where the total obligation to be incurred under or by reason of such contract or arrangement shall not be in excess of five hundred dollars ($500.00). Provided, however, that if the Commission, after a hearing, finds that any public utility is abusing such general rule and thereby evading the purposes of subparagraph (3) hereof, the Commission shall have power to require such public utility to thereafter file and receive the Commission's approval upon all contracts and arrangements described in subparagraph (3) of this section, regardless of amount, and said general rule herein referred to shall remain in full force and effect as to all other public utilities.

SECTION 9.

9. Utilities to comply with requests and to obey orders of commission.) Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all questions submitted by the Commission.

Any public utility receiving from the Commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or general manager of such public utility and returned to the Commission at its office within the period fixed by the Commission.

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

SECTION 10a.

10a. Inspection of certain railroad equipment.) The Illinois Commerce Commission shall have power to exercise the rights, powers and duties vested by law in the inspectors of automatic couplers, power brakes and grab irons or hand holds on railroad locomotives, tenders, cars

and similar vehicles, their officers and employes and the rights, powers and duties vested in the Department of Trade and Commerce as the successor of such officers and employes.

SECTION 61.

61. Safety of plant, appliance, etc., railroad, track, etc.) The Commission shall have power, after a hearing and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand.

Whenever it shall come to the knowledge of the Commission that the equipment or appliances, or the apparatus, track, bridges, trestles or other structures of any common carrier are out of repair or in an unsafe condition, it shall, after an investigation, give notice in writing to the common carrier of the improvements and changes deemed necessary to place the same in a safe condition, and shall recommend to the common carrier that it make such repairs, changes, improvements or new constructions as the Commission shall deem necessary to the safety of person and property being transported thereon. The Com-

mission shall give such common carrier an opportunity for a full hearing, and unless the common carrier shall satisfy the Commission that no action is required to be taken with respect to any or all of such matters, the Commission shall fix a time within which repairs, changes, improvements or new construction deemed by it necessary shall be made. *The Commission may also prescribe the rate of speed for trains or cars passing over defective tracks, bridges, trestles or other structures until repairs or new construction required are made;* and may, if, in its opinion, it is needful or proper, forbid the running of trains or cars over any defective track, bridge, trestle or other structure until the same be repaired and placed in a safe condition.

SECTION 62.

62. Grade crossings.) No public road, highway, or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any other railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade, without having first secured the permission of the commission. Provided, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The commission shall have power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each such grade crossing.

The Commission shall also have power, after a hearing, to alter or abolish any grade crossing, heretofore or hereafter established, when in its opinion, the public safety requires such alteration or abolition, and, except in cities, villages and incorporated towns of five hundred thousand (500,000) or more inhabitants, to vacate and close that part of the highway on such grade crossing altered or abolished and cause barricades to be erected across such highway in such manner as to prevent the use of such grade crossing as a highway, when, in the opinion of the Commission, the public convenience served by the crossing in question is not such as to justify the further retention thereof; or to require a separation of grades, at such crossings; or to require a separation of grades at any proposed crossing where a proposed public highway may cross the tracks of any railroad or railroads; And to prescribe, after a hearing of the parties, the terms upon which such separations shall be made and the proportion in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad companies affected, or between such companies and the State, county, municipality or other public authority in interest: Provided, that nothing in this Act shall be construed to repeal "An Act in relation to the crossing of one railroad by another," approved May 25, 1907, in force July 1, 1907.

The Commission shall also have power by its order to require the reconstruction, alteration, relocation or improvement of any crossing (including the necessary highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the Commission finds after a hearing that such reconstruc-

tion, alteration, relocation or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the commission may direct such reconstruction, alteration, relocation or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary and may apportion the cost of such reconstruction, alteration, relocation or improvement between the railroad company or companies and other public utilities affected, or between such company or companies and other public utilities and the State, county, municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alterations in the equipment of other public utilities affected as well as the cost of the relocation, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, relocation or improvement of said crossing.

Whenever the commission, after a hearing, shall find it necessary for the reconstruction, alteration, relocation or improvement of any such crossing or its necessary approaches as aforesaid, or for the abolishment of any such crossing, to relocate, divert, or establish any highway or public road, or to acquire additional property for any such purpose, it may direct the railroad company or companies to acquire, and the railroad company or companies shall acquire, the necessary additional property for such purposes by purchase or, when the price to be paid can not be agreed upon with the owner thereof, in the manner provided by the law of eminent domain; or the commission may certify such finding to the highway commissioners of the town or road district concerned. Every railroad company operating in the State of Illinois shall

construct and maintain every highway grade crossing over its tracks within the State so that the roadway at the intersection shall be flush with the rails, and unless otherwise ordered by the commission, shall construct and maintain the approaches thereto at a grade of not more than five (5) per cent within the right of way for a distance of not less than twenty-five (25) feet on each side of such tracks; provided, that the grades at the approaches may be maintained in excess of five (5) per cent only when authorized by the commission.

Every Railroad operating within the State of Illinois shall remove from its right of way at all grade crossings within the State, all brush, shrubbery and trees for a distance of not less than five hundred (500) feet in either direction from each grade crossing.

The Illinois Commerce Commission shall have authority, after having made proper investigations, to designate those grade crossings which are deemed extra hazardous. At all such crossings so designated, the commission shall have authority to order the installation of appropriate luminous reflecting warning signs, luminous flashing signals, crossing gates illuminated at night or other protective devices. The commission shall have authority to determine the number, type, and location of such signs, signals, gates or other protective devices, which however shall conform as near as may be with generally recognized national standards, and said commission shall have authority to prescribe the division of the cost of the installation and subsequent maintenance of such signs, signals, gates, or other protective devices between the public utility and the State or its political subdivisions.

Any person who unlawfully or maliciously removes, throws down, injures or defaces any sign, signal, gate or

other protective device, required in this section, shall be liable to a fine of not less than ten dollars ($10.00) nor more than one Hundred dollars ($100.00) for each offense.

The Illinois Commerce Commission shall have authority to order the removal of any obsolete or unnecessary car tracks from the streets or other thoroughfares in this State. The commission shall also have authority to order changes in the grade of car tracks located in streets or other thoroughfares or to order a change in the location of such tracks on such streets or thoroughfares, or the paving of the areas inside of or adjacent to such tracks, when public convenience requires.

Paragraph 80, Section 24, Chapter 114, Railroads and Warehouses, Illinois Revised Statutes, 1953, Smith Hurd Illinois Annotated Statutes, same chapter and section number is as follows:

80. Speed through cities, etc.—Damages.) Whenever any railroad corporation shall by itself or agents, run any train, locomotive engine or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive engine or car; and the same shall be presumed to have been done by the negligence of said corporation or their agents; and in addition to such penalties as may be provided by such city, town or village, the person aggrieved by the violation of any of the provisions of this section, shall have an action against such corporation, so violating any of the provisions to recover a penalty of not less than one hundred dollars ($100), nor more than two hundred dollars ($200), to be recovered in any court

of competent jurisdiction; said action to be a civil action in the name of the People of the State of Illinois, for the use of the person aggrieved; but the court or jury trying the case may reduce said penalty to any sum, not less, however, than fifty dollars ($50), where the offense committed by such violation may appear not to be malicious or wilful; Provided, that no such ordinance shall limit the rate of speed, in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour.

Cities and Villages Act prior to 1941, in effect prior to Feb. 16, 1927, and reenacted July 1, 1927.

"65.20 Speed of Horses, vehicles, etc. 21. To regulate the speed of horses and other animals, vehicles, cars and locomotives within the limits of the corporation".

Illinois Revised Statutes, 1937, Chapt. 24, Article 5, 65.20, p. 348, State Bar Association Edition.

HISTORY OF CITIES AND VILLAGES SPEED LEGISLATION STATUTE.

"This section was originally clause 21 of Article V of laws of 1871-72, p. 218, as amended by laws of 1887, p. 108; laws of 1907-08, p. 26; Laws of 1911, p. 173; laws of 1919, p. 279; Laws of 1921, p. 314; Laws of 1925, p. 228; Laws of 1927, p. 297, 305; Laws of 1929, p. 254, amended Article V and renumbered the Clause Section 21."

Smith Hurd Illinois Annotated Stats.—note under Article 23-28, p. 145, Vol. 24.

Chapter 13, Article 1, Section 160, Ordinances of Village of Raymond, Illinois is as follows: "That no locomotive, engine, railroad passenger car, or freight car, or train

of cars shall be driven, propelled or run within the corporate limits of the said Village of Raymond at a greater rate of speed than ten miles per hour and every railroad company, engineer, conductor or other persons having in charge any such locomotive, engine, railroad passenger car, or train of cars, who shall drive, propel, or run or cause or allow to be driven, propelled or run, any such locomotive, engine, railroad passenger car, freight car or train of cars, within the corporate limits of said Village at a greater rate of speed than ten (10) miles per hour, shall forfeit and pay a fine of not less than five ($5.00) Dollars nor more than One Hundred ($100.00) Dollars for each and every offense".

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953

No. 640

VICTOR HEMPHILL, as Executor of the Last Will and Testament of Joseph Bostick Liston, Deceased,
Petitioner,

vs.

WABASH RAILROAD COMPANY, a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

A Writ of Certiorari Should Not Issue in This Case Because the Review Sought by Petitioner is Essentially a Review of a State Supreme Court's Construction of State Statutes, Which the United States Court of Appeals Followed.

This case presents the question of the validity of an ordinance of the Village of Raymond, Illinois, and involves the matter of the construction of the Revised Cities and Villages Act of 1941 and the Public Utilities Act of the State of Illinois.

In 1872 the Illinois Legislature gave municipalities certain powers, including one which read as follows:

> "To regulate the speed of horses and other animals, vehicles, cars and locomotives within the limits of the corporation."
>
> Ch. 24, Art. V, Sec. 21, Ill. Rev. Stat. (1939).

In 1941 the Illinois Legislature enacted the Revised Cities and Villages Act of 1941 which again listed certain powers in municipalities. Art. 23, Sec. 28 of that act (Ch. 24, Sec. 23-28, Ill. Rev. Stat. 1953) reads as follows:

> "To regulate the speed of animals, vehicles, cars and locomotives."

The substantial similarity of these statutory provisions is apparent.

Both by Statute and by the decisions of the Illinois Supreme Court, it is the law of this State that statutory provisions which are the same or substantially the same as those in a prior statute are a continuation of the prior provisions and are not new enactments. Ch. 131, Sec. 2, Ill. Rev. Stat. (1953) provides:

> "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment."

Among the decisions following this rule of construction are *S. Buchsbaum & Co. v. Gordon,* 389 Ill. 493, 59 N.E. (2d) 832; *People v. National Bankers Ins. Co.,* 369 Ill. 605, 17 N.E. (2d) 579; *People v. W. A. Weibolt & Co.,* 357 Ill. 208, 191 N.E. 689.

Accordingly, any claim that the incorporation of the railroad speed control provision in the Revised Cities and Villages Act of 1941 was a new enactment is not valid and it cannot be said by Petitioner that the 1941 re-enactment was a new and later statute which superceded the provi-

sions and meaning of the Public Utilities Act which was passed in 1921.

Prior to the Revised Cities and Villages Act of 1941 the Supreme Court of Illinois uniformly held that the Public Utilities Act (Ch. 111⅔, Sec's. 1 et seq., Ill. Rev. Stat. 1953) superceded certain powers granted to municipalities by the then Cities and Villages Act, and placed them solely in the Illinois Commerce Commission. Included among these powers was that of regulating the speed of railroad trains. This was held in *City of Witt v. Cleveland, C. C. & St. L. Ry. Co.*, 324 Ill. 494, 155 N.E. 325.

In *City of Altamont v. Baltimore & O. R. Co.*, 348 Ill. 339, 180 N.E. 809, and *Village of Atwood v. Cincinnati I. & W. R. Co.*, 316 Ill. 425, 147 N.E. 449, similar holdings are found in regard to the power of municipalities to require flagmen at railroad crossings. A similar holding is in *City of Chicago v. Chicago Great Western R. Co.*, 348 Ill. 193, 180 N.E. 835, in reference to the regulation by cities of the weighing of railroad freight. The same principle was followed in *Northern Trust Co. v. Chicago Rys. Co.*, 318 Ill. 402, 149 N.E. 422, in regard to the right of a city to regulate head-lights on street cars.

In addition, it has been held by the Illinois Supreme Court that the Illinois Public Utilities Act covers the whole field of service of every utility and leaves no room for the exercise of authority by any body other than the Illinois Commerce Commission. *Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200, 169 N.E. 22; *Illinois Central R. Co. v. Illinois Commerce Commission*, 397 Ill. 323, 74 N.E. (2d) 545. In the Chicago Motor Coach Company case the Illinois Supreme Court in speaking of the Utilities Act said (337 Ill. at p. 209):

> "The language of the act is sufficiently comprehensive to subject every phase of the relations between

every public utility and the public to the supervision and regulation of the Public Utilities Commission." (Now the Illinois Commerce Commission.)

After referring to the various provisions in that act the Court went on to say:

> "These provisions certainly covered the whole field of service of every utility. They left no room for the exercise of authority by any other body."

In the Illinois Central case, regarding the effects of the Illinois Public Utilities Act, the Court stated (397 Ill. at p. 329):

> "The legislature, by the creation of the Illinois Commerce Commission, vested this commission with general supervision of all public utilities. (*Chicago North Shore & Milwaukee Railroad Co. v. City of Chicago,* 331 Ill. 360, 163 N.E. 141.) The Public Utilities Act creating the Illinois Commerce Commission covered the entire subject of public utilities and has been held to be complete in itself and to cover the entire subject. (*Northern Trust Co. v. Chicago Railways Co.,* 318 Ill. 402, 149 N.E. 422.)"

It is also held in Illinois that where the legislature re-enacts a statute which has been judicially construed it is considered to have done so in the light of such construction and to have intended that it will have the same meaning as the prior statute as so construed. *Lamere v. City of Chicago,* 391 Ill. 552, 63 N.E. (2d) 863; *People v. Reilly Tar & Chemical Corp.,* 389 Ill. 434, 59 N.E. (2d) 843; *People v. Missouri Pacific R. Co.,* 388 Ill. 271, 58 N.E. (2d) 47.

The re-incorporation in the Revised Cities and Villages Act of 1941 of the supposed power of municipalities to control speed of trains must, therefore, be given the same status as before, i.e., that such power had been superceded by the Public Utilities Act, which was held to have placed it exclusively in the Illinois Commerce Commission.

Petitioner argues that the power to regulate speed of trains should not be considered to be in the Illinois Commerce Commission because the Public Utilities Act nowhere contains a specific provision to that effect.

Section 8 of that Act (Ch. 111⅔, Sec. 8, Ill. Rev. Stat. 1953) gives the Commission supervision over all public utilities including "the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated . . ." Section 58 (Ch. 111⅔, Sec. 62, Ill. Rev. Stat. 1953) gives the Commission power in reference to the maintenance and operation of grade crossings and to prescribe terms for the use and protection of crossings. Section 57 (Ch. 111⅔, Sec. 61, Ill. Rev. Stat. 1953) gives the Commission power "to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public * * * and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."

The contention of petitioner in this regard, moreover, is moot since the Supreme Court of Illinois has said that the Public Utilities Act did give the Commission that power.

Petitioner takes the position that Article 87, Section 1, of the Revised Cities and Villages Act of 1941 changed the law. This was a new provision enacted in 1941. He relies on the first sentence of the section but the second sentence thereof states:

> "*But* the provisions of this Act *shall not* be considered as impairing, altering, modifying, or repealing any of the jurisdiction or powers possessed by any department, board, commission, or officer of the State gov-

ernment immediately prior to the effective date of this Act." (Italics added.)

In order for this section to give municipalities power to regulate the speed of trains, the first sentence of the section must be isolated from the rest of the Section and the second sentence must be completely ignored.

The difficulty with Petitioner's position is, that the first sentence of the section cannot be isolated and applied without reference to the second sentence. The first sentence is not applicable to conflicting powers where municipalities and the Illinois Commerce Commission are involved, for the obvious reason that the second sentence makes it manifestly clear that the first sentence cannot, in such a case as this, be so applied. In other words, by the second sentence the legislature expressly stated that the powers of the commission should not be impaired, altered, modified or repealed by the provisions of the Revised Cities and Villages Act of 1941 and it would appear conclusive that the legislature did not intend to change the law in respect to the point here in issue. By the second sentence, the legislature preserved unimpaired the exclusive powers of the Commerce Commission in the matter of regulating speed of railroad trains at crossings. To say otherwise not only would be to give a most questionable construction, but, in fact, would be to give an interpretation which plainly flies in the face of the plain language of the second sentence of the section.

We believe there can be no doubt on this point, but even if there could be any, we submit that in view of the decisions of the Illinois Supreme Court as to the undoubted meaning of the Public Utilities Act, it should be left to that Court to make any change in this respect.

The case of *Aliotta v. City of Chicago*, 389 Ill. 418, 59

N.E. (2d) 829, is cited by Petitioner as a corollary authority to substantiate the contention that the speed provision in the Revised Cities and Villages Act of 1941 and the provisions in the Public Utilities Act should now be given a different meaning than before. This case does not support such position. The case is not in point or comparable because it involved a different statute (The Barbers Act) and a basically different situation.

In 1909 the legislature enacted the first statute regarding the licensing and regulation of barbers. This statute was amended from time to time until in 1937 an act revising the law relating to barbers was enacted. The 1937 act vested licensing and regulatory powers in the Illinois Department of Registration and Education. In 1935 the legislature enacted a statute granting municipalities the power to tax, license and regulate barbers and barber shops. The Revised Cities and Villages Act of 1941 contained a provision giving municipalities the power "To license, tax and regulate * * * barbers, and the owners of * * * barber shops."

It was contended in the Aliotta case that the 1937 Barbers Act occupied the entire field of the licensing and regulation of barbers, leaving no room for the exercise of any power by municipalities, so that a 1943 ordinance of the city of Chicago providing for the licensing of barbers was invalid. Relying upon Article 87, Section 1 of the Revised Cities and Villages Act of 1941, the Illinois Supreme Court upheld the ordinance.

It must be noted that the Illinois courts never had held that the 1937 Barbers Act had vested sole jurisdiction over barbers in the Department of Registration and Education, as it had done with respect to the Public Utilities Act and the control of public utilities by the Illinois Commerce

Commission. Accordingly, the background for the Aliotta case was drastically different than that of the instant case. There was no compelling need there as there is here to adhere to the policy announced by the legislature in the second sentence of Article 87, Section 1 of the Revised Cities and Villages Act of 1941.

Furthermore, it should be observed that when the legislature amended the Barbers Act in 1947 it added a provision that nothing in that act should be construed to limit or repeal any power of municipalities to license, tax or regulate barbers or barber shops. (See Ch. 16¾, Sec. 14.96, Ill. Rev. Stat. 1953.) The legislature was particular to remove all doubt on this question by express legislation. Since 1927 when the City of Witt case was decided the legislature has remained silent, apparently content with the construction placed upon the Public Utilities Act by the Illinois Supreme Court. No provision similar to that added to the Barbers Act in 1947 can be found in the Public Utilities Act. No legislation affecting the question presented here has been adopted except Article 87, Section 1 of the Revised Cities and Villages Act of 1941, which, it is submitted, strengthens rather than weakens our position.

Evidently the Illinois Legislature deems that different public policy is inherent in the two situations. Barbers and barber shops are local in character while railroads operate through many cities and villages and it is patent that the public policy of the State is to lodge the control of the operation of trains in one central body—the Illinois Commerce Commission, in this case.

Petitioner attempts to draw from *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N.E. (2d) 26, (the so-called second Geneseo Case) the point that where there is no specific grant of a power to the Illinois Com-

merce Commission, and there is a specific power given to a city or village, the latter will prevail. As a matter of fact, the case does not hold with Petitioner on the particular power of the Commerce Commission here involved, i.e., the exclusive power of that Commission over the speed of railroad trains in municipalities. In this Geneseo case the Court recognized that specific power on that subject was given to the Commission by the Public Utilities Act, and prevailed over any similar power supposedly possessed by cities and villages under the Cities & Villages Act.

In this decision the Court recognized that sufficiently specific power was delegated to the Commission to exclusively regulate certain matters, including that of the regulation of railroad trains in municipalities. The Court said (378 Ill. at p. 515):

> "In *City of Witt v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.*, 324 Ill. 494, 155 N.E. 325, it was held that Section 57 of the Public Utilities Act superseded the authority of a city to enact an ordinance limiting the speed of trains."

Following reference to other similar sections in the Public Utilities Act having the same effect, the Court went on to say (378 Ill. at p. 516):

> "It is the authority granted the Commerce Commission by other sections which does interfere with the power of a city in those respects, that brings about this result. The power granted the Commerce Commission by Sections 49, 52, 53, 54, 57 and 58 is direct, special and *necessarily exclusive.*" (Italics added.)

Then, referring to the City of Witt case and others, (378 Ill. at p. 517):

> "In each of the above cases the court held there was a specific grant of authority to the Commerce Commission giving it jurisdiction over something which before that time had been within the jurisdiction of a city or village. There was no doubt about

> a conflict of authority. The provisions of the statutes were in direct opposition to each other, and under the well-settled principles of statutory construction the powers granted the Commerce Commission became the dominant ones without a specific repeal of the conflicting statutory powers granted cities and villages. There was no question in those cases of inferring a grant of power in the commission, and no question but that there was a direct conflict in which one or the other was superior."

Accordingly, the so-called second Geneseo case, rather than lending support to Petitioner's position, re-affirms the prior holding of the Illinois Supreme Court upon the point involved here.

Petitioner's argument appears to be based upon a mystical feeling that the legislature and the Supreme Court have had a change in heart, that feeling being based upon the first sentence of Article 87, Section 1 of the Revised Cities and Villages Act of 1941, the Aliotta case and the second Geneseo case. The complete lack of foundation for this feeling is best illustrated by the provisions of the second sentence of the said Article 87, Section 1 and the language of the Illinois Supreme Court in *Illinois Central R. Co. v. Illinois Commerce Commission*, 397 Ill. 323, 74 N. E. (2d) 545, decided in 1947 after both the second Geneseo and Aliotta cases, where it was said (397 Ill. at p. 329):

> "The legislature, by the creation of the Illinois Commerce Commission, vested this commission with general supervision of all public utilities. (*Chicago North Shore & Milwaukee Railroad Co. v. City of Chicago*, 331 Ill. 360, 163 N. E. 141). The Public Utilities Act creating the Illinois Commerce Commission covered the entire subject of public utilities and has been held to be complete in itself and to cover the entire subject. (*Northern Trust Co. v. Chicago Railways Co.*, 318 Ill. 402, 149 N. E. 422)."

From the foregoing we respectfully submit that the Illinois law on the point involved here is clear and that the Federal Courts should not change or attempt to change it upon a new interpretation wrung from the Aliotta and second Geneseo cases.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit, in its decision in this cause, correctly and properly followed the state law in Illinois as expressed by the decisions of the Supreme Court of Illinois on the subject matter here involved.

We therefore respectfully submit that Petitioner's request for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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